# JUDGMENT SEMINAR

1994-1995

Professor Jennifer Nedelsky

Faculty of Law

University of Toronto

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## JUDGMENT COURSE MATERIALS

### January, 1995

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## POL 2026; LAW 372S

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## Professor Nedelsky

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This course explores the nature of the human faculty of judgement. We will be looking at the connections and differences between the judgements we make every day (is it a good course, book, movie) and moral, political and legal judgements.

There are two different kinds of problems our exploration will try to address. The first arises out of feminist theory, critical legal theory and a variety of other contemporary approaches to law. In all of these approaches that has been an emphasis on the importance of recognizing the multiplicity of different "voices" in our diverse society. Our legal system, like all of our institutions, has presupposed an unitary framework of discourse to which all who want to participate must conform. The call to recognize difference and make it possible to everyone's voice to be heard is a positive move. But it poses problems that are still to be worked out. A judge can adjudicate between two sides of a story when the story has a recognizable unity, that is when both sides have fit into a common framework. But if we no longer try to force diverse perspectives into the dominant framework, judges will be faces with truly incommensurable stories. (This already sometimes happens in cases of rape, sexual harassment and "hate speech.") How are we to judge between them? A related question arise with respect to the conventional virtues of judicial judgment: neutrality, impartiality, objectivity. What becomes of these virtues, how do we need to reconceptualize them, when we recognize the role of passion in knowledge and the inevitability of perspective in understanding? A large part of the project of the course is to see the ways philosophical writings on the nature of judgement may be able to help us solve these pressing problems. Two of the common themes that link the philosophical and contemporary legal arguments are the role of story telling or narrative and the role of common sense in judgement.

The second problem is a long standing one: is there something distinctive about the <u>legal</u> form of judgement that justifies (or requires) the institutional forms we have developed for judicial decision making. This problem involves not only the "undemocratic" nature of courts, but the particular norms of discourse that we think of as "legal." If we have a better understanding of what judging consists of, and what foster good judgement, then we can do a better job of

thinking about the appropriate institutions, norms and practices of law. Since many of the readings address themselves to the question of political and moral judgement, we will have to ask whether there is reason to believe that legal or judicial judgement involves something different.

COURSE REQUIREMENTS: Class participation and bi-weekly one page "comments" (25%) and a 20-25 page paper due April 4 (75%).

REQUIRED READING:
Ronald Beiner, Political Judgement, Hannah Arendt, Lectures on Kant's Political Philosophy, Ronald Beiner, ed. and materials to be distributed and/or purchased through the Law School Bookstore

Week 1. Introduction

Week 2. Beiner, pp. xiv-30; Hannah Arendt, "The Crisis in Culture" Part II (Part I optional) from Between Past and Future; Eloise A. Buker. Come to class with an example of a problem of judgement and thoughts on how these preliminary readings help us reflect on it.

Week 3. Beiner, Ch. 3,4, 5 pp.31-100

Week 4. Beiner, Ch. 6; Patricia Williams, "The Obliging Shell: An Informal Essay on Formal Equality;" excerpt from Patricia Hill Collins, Black Feminist Thought

Week 5. Excerpts from Martha Nussbaum, Loves'Knowledge

Week 6. Materials for a concrete example

Week 7. Larmore, Ch 1, Ch 3.

## Section 2: Description of Proposed Research

Name of principal investigator
Jennifer Nedelsky

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### Detailed Description

Contemporary legal scholarship poses a challenge that extends beyond the academic community to the legitimacy of our legal system. This project will explore four dimensions of that challenge and show that there is a philosophical literature on judgement that provides a framework for understanding those challenges and integrating them into a new conceptual foundation for the practice of judging. The legal scholarship on feminist and critical race theory has effectively undermined the values conventionally thought essential to good judgement: impartiality, objectivity, neutrality. Yet it has made little use of philosophical accounts of judgement that could help generate the necessary alternatives or reconceptualizations of these values. Similarly the philosophical literature has explicitly differentiated its project from <u>legal</u> judgement, without adequate inquiry into the contemporary theory that rejects the conventional distinctions between law and politics. The project thus brings together two bodies of literature which have had little contact with each other. The result will be first, a better framework within which to work out the ongoing practical and theoretical project of generating a "revised ideal of legality" (Michelman, 1987), and second, a better understanding of four problems that lie at the heart of some of the most interesting theoretical debates and pressing contemporary conflicts: 1) the possibility of new meanings for impartiality, objectivity, and neutrality as values to which judges should aspire; 2) the way the use of narrative in legal scholarship challenges our understanding of legal "knowledge," and thus not just what is appropriate scholarship, but what is appropriate legal education and appropriate practice in the courtroom, by both lawyers and judges; 3) what to do about incommensurable stories; how do we adjudicate when, as in cases of alleged rape or sexual harassment or racial insult, there is agreement on the "facts," the description of events, and completely divergent understandings of the meaning of those events; 4) how do we understand the claims for the transformational potential (and thus necessity) of groups such as women's consciousness raising groups or Black caucuses that exclude members of the dominant group?

The central contribution of the project is to show that the conception of judgement as a distinctive human faculty can help us make sense of these problems in ways which, in turn, enrich our understanding of judgement. I take as my starting point Hannah Arendt's work on judgement (1963, 1983) made accessible and elaborated by Ronald Beiner (1983). In this approach, judgement is distinguished from other human faculties (like reasoning in the pursuit of truth) by its reliance on community and story telling, and by the special role of subjectivity and persuasion. The judge seeks not a truth that can be proven, but a judgement whose soundness rests on its capacity to persuade those who share the "common sense" of the judge's community.

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These features offer exciting possibilities: a theoretical account for the growing importance of narrative in legal (and feminist) scholarship; an understanding of caucuses that exclude as providing an alternative community and "common sense" within which judgements are made; a framework that treats judgement as about neither opinion nor truth, leaving room for a conception of impartiality that acknowledges subjectivity as a starting point. The problem of incommensurable stories is connected to the role of both narrative and community, and points to a limit within this philosophical tradition: it will require additional development to be able to deal with diverse communities with competing "common senses," which must live within a common legal and political community. This limit is not, however, peculiar to the literature on judgement. On the contrary, it highlights a central problem to which none of our traditional conceptions of law or judgement is adequate. Fair, neutral, impartial adjudication has always presumed a shared framework which is itself neutral and impartial between contesting parties. If neither the content of the rules of law nor the community-based framework of judgement is shared, if both contain values and presuppositions which better fit one of two competing stories, we must redefine fair adjudication and our ideals of judging. Our modern conception of judgement must highlight the challenges of judging across competing frameworks, which have divergent perspectives on the facts (as in rape cases) as well as on fairness (as in disputes about systemic discrimination and affirmative action).

PART I. In the first part I will elaborate the conceptualization of the four problems I have outlined here. This part has two components. The first is showing how these problems are emerging as central issues in legal scholarship and connecting them to the related debates outside the academy, such as debates over the new rape law, sexual harassment policies and procedures of adjudication, and charges of bias in the legal system. The second, but more important, part is refining the articulation of the nature of the problems and demonstrating why they properly command our attention. The links between the problems also need to be spelled out, so that we can see how, together, they require a new conceptual framework.

The issue of challenges to traditional conceptions of impartiality, neutrality and objectivity requires an argument about why I think these challenges haye been effective -- since there is by no means consensus on this issue. Here I will put the legal debate in the larger context of feminist epistemology and political theory, which has tried to replace or recast these concepts.(Harding, 1987; Code, Mullet, Overall, 1988; Young, 1990; Benhabib, 1987) I will try to show that there remains an important gap in all of these theories: the reconstruction of a vision of good judgement in the absence of the traditional concepts.

Some theorists seem not to recognize the need for such a new foundation for our understanding of law. For example, Iris Marion Young begins an excellent article with a commitment to the rule of law (1987). But she then proceeds to effectively undermine a conception of impartiality that has been essential to the dominant conceptions of the

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rule of law -- without returning to the question of what the rule of law is to be without this form of impartiality. Other theorists suggest that we ought not focus our attention on adjudication. In the context of a proposal for a new conception of objectivity, Sandra Harding (1990) was asked what to do when faced with incommensurable stories and corresponding arguments for policy, such as the conflicting views among women about new reproductive technologies and contractual pregnancy (so called "surrogate motherhood"). She responded that we should try to understand the sources of the competing perspectives; the preoccupation with judging between them is a concern of those in power. But, in fact we are all called upon to make judgements between competing perspectives, and we need to know how to do so wisely and fairly. And, of course, law as we know it requires such judgements routinely. If we are to replace traditional notions of objectivity, we need to know what the alternative ideal would be for judgement. Finally, there are several fine theorists at work on various forms of the project of reconceptualizing the practice of judging (e.g., Minow, 1990; Minow and Spelman, 1988; Resnick, 1988) But there has been no systematic use of the philosophical literature on judgement to which I refer.

Narrative has emerged as a powerful and contested form of legal scholarship (Scheppele, 1989; Abrams, 1991). But there has been relatively little theoretical exploration of just what it is that narrative contributes and how it challenges our understanding of the kind of knowledge -- or mental processes -- appropriate to legal judgement (Abrams, 1991). The only thing that is really clear is that the use of narrative makes tacit and explicit claims about the appropriate role of emotion in judgement -- claims challenging the conventional meaning of disinterest, impartiality and objectivity. Here I will link these issues to the feminist theory that challenges the conventional split between reason and emotion. My most important purpose, however, is to frame the emergence of narrative in a way that will reveal how well it fits into both the Arendtian and Aristotelian conceptions of the role of storytelling in judgement.

My objective in discussing incommensurable stories is both to show how many currently divisive issues are best understood in these terms and to show that once we acknowledge the routine existence of incommensurable stories, the theoretical problems for judgement are formidable.

The issue of exclusionary groups for those who have been disadvantaged is, of course, a subject of ongoing debate on university campuses (often around membership rules for women's centres). My purpose here is to articulate the claims for their transformative power, in order to show that the conception of judgement grounded in community offers a new and compelling framework for understanding those claims. This explanation will also contribute to a broader theoretical debate generated by theories of the social construction of reality. These theories hold out the promise of the infinite malleability of the world through language, but often provide little sense of how it is that we can ever move beyond the conceptual frameworks in which we are inevitably enmeshed (e.g., Peller, 1985). Consciousness-raising groups

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offer a model of how a shift in the community in which one articulates, perceives, and judges the world makes possible a shift in the content of those formulations, perceptions, and judgements (MacKinnon, 1982). But the literature has been lacking in a fully adequate account of why that should work. By framing the question in this way, we will be able to see how the role of community in judgement can provide that account. The result (by the end of the project) will be a solution to an important theoretical problem (which goes beyond the concerns of feminism) and a new form of reasoned justification for a contentious political practice.

PART II. In the second part of the project, I will begin with the striking fact that conceptions of judgement that differ in important ways, such as Kant's and Aristotle's, share a primary role for storytelling and community. I will begin with Arendt's conception of judgement, as she develops it out of her treatment of Kant. I will then look at the divergent understandings of community underlying Aristotle's concept of phronesis and Kant's concept of judgement. This exploration will begin with Beiner's Political Judgement, and include a discussion of Gadamer and Habermas. The focus, and the contribution to this literature, will be provided by the project of generating a theoretical framework for the problems outlined above. In the process of constructing this framework from these diverse theories of judgement, I will provide a clearer picture of the limits of these approaches and thus the areas that require further development in order to provide a new foundation for the practice of judging (see PART III).

Part II will also focus on the ways in which a conception of judgement that is distinct from the apprehension of the truth or deductive reason is much more hospitable to the contemporary challenges to neutrality, impartiality, and objectivity than the conventional ideal of judicial decision-making. In this section I will also look at Martha Nussbaum's use of Aristotle for her development of conceptions of knowledge different from the prevailing "scientific" and economistic models (1990). I will link her work to Arendt's argument (drawing on Kant) that matters of taste -- and questions of judgement -- are inevitably subjective, but are not mere arbitrary preferences: "Taste judgements, furthermore, are currently held to be arbitrary because they do not compel in the sense in which demonstrable facts or truth proved by argument compel agreement. They share with political opinions that they are persuasive; the judging person ... can only 'woo the consent of everyone else' in the hope of coming to an agreement with him eventually" (Arendt, 1963, p.222). Judgement appeals to "common sense" because it seeks this agreement, and claims that, in principle, it can be achieved. Both Nussbaum and Arendt (in quite different ways) are making the crucial argument that in spheres where claims to (absolute, objective) truth are inappropriate, we have a human capacity for seeking agreement that is something quite different from the aggregation of preferences. The contemporary challenges to the judicial ideals of objectivity and impartiality require just such a framework within which to proceed.

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PART III. These theories of judgment help construct a framework, but they do not provide all the answers. The two problems I will focus on in this section are impartiality and incommensurable stories. There are differences between the philosophical approaches noted above in the vision of how the starting point of individual subjectivity is transformed or transcended. In particular, there are differences between the Kantian and Aristotelian conceptions of how the appeal to common sense or the shared community of values is to take place. The problem in our contemporary world is how to form judgements when part of the decision seems to be a choice among competing communities of values and when there are important spheres in which there seems to be no shared common sense. Narrative may turn out to provide a path for communication across as well as within communities of value, and contemporary feminist treatments of Habermasian communicative ethics may also help (Benhabib, 1987). Working out this problem is essential for a conception of judgement that can work in the legal sphere.

PART IV. This section will address the unspoken problem underlying all the arguments above: is there something distinctive about legal judgement? I have been deliberately drawing on arguments about <u>political</u> judgement (particularly in the case of Beiner and Arendt), arguments intended, in part, to distinguish themselves from legal judgement. While I recognize and appreciate the importance of articulating the role of judgement in politics, I want to proceed from there to argue that the key dimensions of the conception of political judgement <u>do</u> apply to legal judgement. This argument will require going beyond, and perhaps in opposition to, the views of Arendt and Kant. For example, Arendt says, "the chief difficulty in judgment is that it is 'the faculty of thinking the particular' [citing Kant, <u>Critique of Judgment</u>, Introduction, section IV]; but to <u>think</u> means to generalize, hence it is the faculty of mysteriously combining the particular and the general. This is relatively easy if the general is given --as a rule, a principle, a law -- so that the judgment merely subsumes the particular under it." (1983, p.76) But this is far too casual a description of what is entailed in deciding a legal case -- especially in a common law system. Case law seems to entail just this mysterious process of combining the general and the particular. Certainly in some instances legal judgement is an example of her next claim: "The difficulty becomes great 'if only the particular be given for which the general has to be found.'" (Ibid.) My project will require me to address the question of why Kant did not treat law as a matter of judgement. But that will not be my central concern. My task is not simply to apply existing conceptions of judgment, but to develop a better understanding of legal judgement.

My basic starting point will be that the conventional grounds for differentiating legal from political judgement are unpersuasive. For example, Beiner says that "Aristotle differentiates political judgement from legal judgement by reference to time, defining the former as future-oriented." (p.90). But it is precisely part of the complexity of judicial decision making that it must judge actions in the past not only in light of assessments of norms shared in the past (at the time

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of the action) and the present (at the time of the decision), but also in light of deliberations about what norms should prevail in the future. There are always tensions here, but it is deceptively simple to say that legal judgement need not be future oriented.

Of course, the deeper question here is the old one of whether there is a distinction between law and politics. For my purposes here, I will recast that as whether there is something distinctive about the kind of judgement called for in adjudication -- something which makes the insights of the literature I have been calling upon inappropriate. I will argue that the answer is no, but look for particular areas that might require revision.

Finally, I will use as examples interviews with five to ten judges and policy makers who have had to make judgements in the face of sharply divergent perspectives (such as those in sexual harassment cases and the academic freedom vs. hostile learning environment debate).

PART V. The conclusion will articulate the conception of judgement that emerges from the effort to use it to address the four initial problems. This final section will also connect this conception of judgement to the broader project of an alternative ideal of legality (e.g., Michelman, 1987; Minow, 1990; Levinson, 1988, Radin, 1988). In particular, I will connect it to my own earlier work on relationship as the basic framework for legal analysis. I will argue that new visions of rights (as are emerging from Charter jurisprudence as well as legal scholarship [Lessard, 1991]) will require a new understanding of judgement, and vice versa.

Communication: To academics, by continuing my active participation in conferences and workshops, publication in journals, and a book. To non-academics, by presentations such as those I have made to the Justice Department, Treasury Board, Canadian Bar Association, Ontario, Centre for Advanced Management (senior civil servants)

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# Taking Account of Women in Jurisprudence: Method and Judgement

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